

HARTFORD INSURANCE COMPANY )  
OF THE MIDWEST, )  
 )  
Plaintiff, )  
 )  
v. ) No. 4:04 CV 1537 DDN  
 )  
BEATRICE WYLLIE, JILL SPREHE, )  
ROBERT FAERBER, and AMY FAERBER, )  
 )  
Defendants. )

This matter is before the court on the motion of defendant Beatrice Wyllie to dismiss. (Doc. 5.) The parties have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Defendants Jill Sprehe, Robert Faerber, and Amy Faerber are the plaintiffs in an action currently pending in the Circuit Court of St. Louis County. (Doc. 1, Ex. B.) Wyllie is a defendant in the county lawsuit, in addition to other corporate and individual defendants. In the county action, Sprehe, R. Faerber, and A. Faerber allege that Wyllie is liable for breach of contract and fraud in connection with the sale of real property (a condominium unit) located in St. Louis, Missouri. (Id. at 2.) Specifically, the county plaintiffs claim Wyllie misrepresented the condition of the property in the Seller's Disclosure Statement. To this end, they pray for \$19,391.00 in damages, costs, attorney's fees, the diminution in property value, and punitive damages. (Doc. 1, Ex. B.)

In her motion to dismiss, Wyllie alleges the amount in controversy in this action does not reach the requisite \$75,000 for federal jurisdiction. (Doc. 7.) Wyllie asserts that the pleaded specific damages (\$19,391.00), diminution in value, on-going expenses, and attorney fees do not establish jurisdiction. Moreover, Wyllie notes that any award for punitive damages cannot be included to establish the jurisdictional amount, because the county plaintiffs cannot recover punitive damages absent showing intent, malice or reckless disregard, and such findings are specifically excluded under the policy. (Doc. 5 at unnumbered 2.) In response, Hartford contends that Wyllie has failed to provide sufficient proof that the damages at issue are less than the requisite \$75,000. (Doc. 11 at 1.) Further, Hartford alleges the attorney's fees can realistically be expected to exceed \$10,000, which in addition to the unspecified repair costs, diminution in value, \$19,391.00 assessment fee, and punitive damages, could reasonably reach \$75,000. (Id. at 3-4.) Therefore, Hartford argues its entire \$300,000 liability limit is at stake in this matter, providing subject matter jurisdiction. (Id. at 2.)

#### **Motion to Dismiss**

The Declaratory Judgement Act (the Act) states that  
[i]n a case of actual controversy within its jurisdiction,  
. . . any court of the United States, upon the filing of an  
appropriate pleading, may declare the rights and other legal  
relations of any interested party seeking such declaration,  
whether or not further relief is or could be sought. Any such  
declaration shall have the force and effect of a final  
judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).<sup>1</sup>

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<sup>1</sup>The parties do not dispute the fact that there is an "actual controversy" in this action. See Marine Equip. Management Co. v. United States, 4 F.3d 643, 346 (8th Cir. 1993) (quoting Caldwell v. Gurley Refining Co., 755 F.2d 645 (8th Cir.1985) ("The test to determine whether there is an actual controversy within the meaning of the Declaratory Judgment Act is whether 'there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'")).

The Act does not provide an independent basis for subject matter jurisdiction. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 670-71 (1950); Victor Foods, Inc. v. Crossroads Econ. Dev. of St. Charles, 977 F.2d 1224, 1227 (8th Cir. 1992).

In order for a federal court to have diversity jurisdiction over the parties, "the matter in controversy [must exceed] the sum or value of \$75,000, exclusive of interests and costs, and the matter [must be] between (1) citizens of different States . . . ." 28 U.S.C. § 1332(a).<sup>2</sup> At issue is whether plaintiff's damages exceed \$75,000. See Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002) ("The district court has subject matter jurisdiction in a diversity case when a fact finder could legally conclude, from the pleadings and proof adduced to the court before trial, that the damages that the plaintiff suffered are greater than \$75,000."). The precise issue for the court to determine "is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are: In other words, an amount that a plaintiff claims is not 'in controversy' if no fact finder could legally award it." Id.

Ordinarily, the amount claimed by the plaintiff controls in determining whether diversity jurisdiction exists. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938); see also Zunamon v. Brown, 418 F.2d 883, 885 (8th Cir. 1969). However, plaintiff's allegations of the jurisdictional amount are not necessarily dispositive of the issue. Zunamon, 418 F.2d at 885. When determining whether plaintiff has met the requisite amount, a court may consider affidavits and answers to interrogatories to either support or defeat diversity jurisdiction.

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<sup>2</sup>The parties do not contest that diversity of citizenship exists in this case; Hartford is organized under the laws of Connecticut, with its principal place of business in Connecticut. Defendants are residents of either St. Louis City, or St. Louis County, Missouri. (Doc. 1 at 3.)

Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994).

If the complaint fails to state the amount in controversy, or states the amount for less than the jurisdictional minimum, then the party invoking jurisdiction must establish the amount in controversy exceeds \$75,000 by a preponderance of the evidence. In re Minnesota Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003); Trimble v. Asarco, Inc., 232 F.3d 946, 959 (8th Cir. 2000). "The complaint will be dismissed if it appears to a legal certainty that the value of the claim is actually less than the required amount." Id.

In determining the amount in controversy in a declaratory judgment action, the court looks to the value of the object of the litigation. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977). It is not axiomatic that the amount in controversy is met if the policy limit exceeds \$75,000. If the substance of the declaratory judgment seeks to determine whether an insurance policy itself is valid, then the policy limit is, essentially, the value of the object of the litigation. Home Ins. Co. of N.Y. v. Trotter, 130 F.2d 800, 803 (8th Cir. 1942).

In contrast, if the declaratory judgment seeks to determine whether an occurrence is covered under the policy, then the court must look to the value of the object of the litigation, i.e., the underlying claim. See Hartford Ins. Group v. Lou-Con, Inc., 293 F.3d 908, 911 (5th Cir. 2002) (quoting 14B Wright & Miller, Fed. Pract. and Proced. 3d § 3710 (3d ed 1998) ("[I]n declaratory judgment cases that involve the applicability of an insurance policy to a particular occurrence, 'the jurisdictional amount in controversy is measured by the value of the underlying claim--not the face amount of the policy.'")); cf. In re Minnesota Mut., 346 F.3d at 834 (finding the policy limit satisfied the amount in controversy, because "if [plaintiffs] would receive the equitable relief that they have requested, they would be due the face value of their policies").

To reason that the policy limit reflects the amount in controversy would essentially "federalize" any action concerning an insurance policy with limits greater than \$75,000 regardless of the claim for damages. Such a holding is incongruous with the principle of limited jurisdiction in federal courts. See Godfrey v. Pulitzer Pub. Co., 161 F.3d 1137, 1141 (8th Cir. 1998) (internal citations and quotations omitted) ("Federal courts are courts of limited jurisdiction. The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.").

As support for its position, Hartford cites to Quinn v. Kimble, 228 F. Supp. 2d 1038 (E.D. Mo. 2002). The plaintiffs in Quinn brought suit to recover for neck and back injuries, past and future medical expenses, permanent, progressive and disabling injuries, loss of the ability to work and enjoyment of life, and lost wages. Id. at 1041. Plaintiffs filed a motion for remand alleging a lack of jurisdiction on the face of the complaint. Id. at 1039. Defendant countered with evidence showing that plaintiffs had serious, chronic impairments, and that plaintiffs will need continued care in the future. Id. at 1039-40. Defendant also referenced jury verdicts, in the same jury pool, awarding damages up to forty-five times the amount of medical bills. Id.

This court found jurisdiction was proper based on the fact that "[plaintiffs] each claimed numerous serious and disabling injuries, and the chiropractic evaluation confirmed multiple injuries." Id. at 1041. Accordingly, this court determined a fact-finder could conclude plaintiffs sustained damages in excess of \$75,000. Id. at 1040-41; see Kopp, 280 F.3d at 885.

The facts of the instant case are distinguishable from Quinn. In Quinn, the pleaded damages were not easily quantifiable; i.e., future care, medical expenses, loss of inability to work, and loss of enjoyment of life. Therefore, the court had to speculate, to

some extent, on what amounts the jury could legally award, because no precise damage calculations were available. Here, the circuit court action seeks damages for items, with the exception of punitive damages, that are more readily quantifiable: assessment cost, diminished property value, and attorney's fees.

Hartford states in its complaint for declaratory judgment that Wylie seeks defense and indemnification only with respect to Count II (fraud). To this end, the plaintiffs in the county action request damages under Count II in the following amounts:

**Count II--Fraud against Wylie and other circuit court defendants, jointly and severally**

in excess of \$25,000  
unspecified

actual damages  
punitive damages

(Circuit Court of St. Louis County, First Amended Petition, Doc. 15, Ex. C 4, 8.) In support of their Count II claim, the county plaintiffs allege that they have been damaged in the amount of \$19,391.00 for a special assessment, costs of repair, assessments, diminution in property value, and physical damage. (Doc. 15, Ex. C at 8.) Although not entirely clear from the petition, it appears these costs are due, in part, to problems with the heating and cooling system, the roof, the elevators, the gutters, the exterior walls, and the up and down spouts. (Id. at 2-3.)

In a response to interrogatories,<sup>3</sup> the county plaintiffs allege the total damages requested for Counts I and II include \$4,538.00 in attorney's fees, as of January 12, 2005,<sup>4</sup> \$19,391.00, an "additional anticipated special assessment for plumbing," and the diminished value of the condominium. (Doc. 19.) See Larkin,

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<sup>3</sup>The county plaintiffs' interrogatory answers were provided to this court in the form of a letter from defendant Beatrice Wylie's attorney. (Doc. 19.)

<sup>4</sup>Neither party argues that the county plaintiffs' attorney fees are recoverable as a matter of law and should be included in determining the amount in controversy.

41 F.3d at 387 ("In determining the amount in controversy pursuant to a motion to dismiss, answers to interrogatories serve as the equivalent of affidavits to either support or defeat diversity jurisdiction."). Moreover, defendant Wylie states that her attorney's fees are not expected to exceed \$10,000. (Doc. 5 at ¶ 8). See Visintine v. Saab Auto. A.B., 891 F. Supp. 496, 497 (E.D. Mo. 1995) ("In determining the amount in controversy, . . . attorney's fees are considered."). Hartford disputes this claim, arguing the fee can be expected to be much higher, as the issues are complex and may involve experts for repair assessment and appraisal. (Doc. 11 at 2-3.)

While the county plaintiffs did not re-allege a claim for punitive damages (in general or in specificity) when answering interrogatories, they did request punitive damages in Count II of the first amended petition. Defendants claim that the instant insurance policy excludes recovery for punitive damages; therefore, they cannot be considered in determining the amount in controversy. Fraud is an intentional tort, and as such, Missouri allows for an award of punitive damages should the complaining party make a submissible case. Werremeyer v. K.C. Auto Salvage Co., Inc., 134 S.W.3d 633, 636 (Mo. 2004) (fraud is an intentional tort); Perkins v. Dean Machinery Co., 132 S.W.3d 295, 300 (Mo. App. 2004); Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 766 (8th Cir. 2001) ("Punitive damages, of course, may be used to establish diversity jurisdiction."). It is not the province of this court to decide, at this juncture, whether the defendants will successfully recover punitive damages in their county action. See Zunamon, 418 F.2d at 887 ("Jurisdiction is measured by the amount properly pleaded or as of the time of the suit, not by the end result.").

Furthermore, it is not for the court to determine on the instant motion whether Hartford will be required, under the policy, to indemnify a punitive damages award. This is precisely what Hartford has requested the court decide in this action. The court

is able to consider the claim for punitive damages in calculating the amount in controversy based on the mere fact that the claim of fraud allows a jury to award punitive damages, should defendants make the requisite showing. Cf. Varboncoeur v. State Farm Fire and Cas. Co., --- F. Supp. 2d ----, 2005 WL 356252 at \*11 (S.D. Iowa Jan 14, 2005) (holding the claim for punitive damages can be considered in determining the amount in controversy, because Iowa law allows an award of punitive damages for intentional torts); Kopp, 280 F.3d at 885 ("[A]n amount that a plaintiff claims is not 'in controversy' if no fact finder could legally award it.").

The only liabilities stated in any dollar amount are the \$19,391.00 for the assessment and the \$10,000 maximum Wyllie alleges with regard to her attorney's fees. Assuming Wyllie's attorney's fees will not exceed \$10,000, this amounts to \$29,391.00, excluding punitive damages, a dollar amount for the diminution in property value, and a dollar amount for additional assessments. In making its determination, the court is mindful that the county plaintiffs are constrained in their ability to allege tort damages in a state court complaint, Mo. Sup. Ct. R. 55.19 ("In actions for such damages based upon an alleged tort, no dollar amount or figure shall be included in the demand, but the prayer shall be for such damages as are fair and reasonable."), and that the amount in controversy does not need to be alleged with exact precision.

Given the extent of the alleged damages, potential for punitive damages, future assessment costs, diminished property value, and the fact that there is no indication plaintiffs intend to seek or limit their recovery to \$75,000 or less, the court cannot say that it appears to a legal certainty this action fails to meet the jurisdictional amount. See James Neff Kramper Family Farm P'ship v. IBP, Inc., 393 F.3d 828, 831 (8th Cir. 2005) ("[I]t is legally certain the claim is really for less than the jurisdictional amount, and the district court should have dismissed



the federal action."); Trimble, 232 F.3d at 834 ("The complaint will be dismissed if it appears to a legal certainty that the value of the claim is actually less than the required amount.").

Accordingly, the court has jurisdiction under 28 U.S.C. § 1332 to adjudicate Hartford's request for declaratory relief (Doc. 1).

For these reasons,

**IT IS HEREBY ORDERED** that the motion of defendant Beatrice Wyllie to dismiss (Doc. 5) is denied.

A handwritten signature in cursive script, reading "David D. Noce". The signature is written in dark ink and is positioned above a horizontal line.

DAVID D. NOCE  
UNITED STATES MAGISTRATE JUDGE

Signed this day, March 28, 2005.